Supreme Court, U.S.
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No. 97-1551

In The

Supreme Court of the United States

October Term, 1997

DANNY L. RUSSELL,

Petitioner,

vs.

PLANO BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Plano Bank & Trust disagrees with the Questions Presented for review in the Petition.

The sole question is whether the Court should exercise its discretion to grant the Petition when the Petitioner failed to perfect issues for appeal, failed to demonstrate any error in the trial court, and failed to show any conflict in the Circuit Courts on any issue of substantive or procedural law applied by the courts below.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Plano Bank & Trust is a wholly owned subsidiary of Plano Bancshares, Inc. Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner Danny L. Russell (hereinafter referred to as "Russell") filed his Complaint on May 19, 1995, alleging that Plano Bank & Trust (hereinafter referred to as the "Bank") had discriminated against him in violation of the Americans With Disabilities Act, as amended, 42 U.S.C. § 12101, *et seq.* (hereinafter referred to as the "ADA"). After the close of evidence, and before submission to the Jury, Russell asserted several specific objections to the Court's Charge which are not relevant here. He then added, as his only other "objection": "Can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground."

Thereafter, the Jury unanimously determined that Russell was not a "qualified individual with a disability" as defined in the Charge. Petitioner's Appendix C, p. 38a. In accordance with the verdict of the Jury, the District Court entered Judgment in favor of the Bank. On August 23, 1996, the District Court entered its Amended Final Judgment in which it ruled that Russell take nothing on all of his claims, including his claims under the ADA. Russell then appealed. The Fifth Circuit Court of Appeals affirmed the Judgment of the District Court on December 19, 1997. *Russell v. Plano Bank & Trust*, 130 F.3d 715 (5th Cir. 1997).

STATEMENT OF FACTS

A. Russell's Job Responsibilities With The Bank Before His Brain Injury

(i) *The Written Job Description*

Russell began his employment at the Bank in August of 1980 as a Vice-President. Russell was a valuable employee of the Bank,

and received several promotions throughout his employment at the Bank. Russell received his last promotion in 1989, at which time he was promoted to Special Asset Department Manager.

As Special Asset Department Manager, Russell's duties and responsibilities at the Bank, as specifically detailed in his written job description admitted into evidence at the trial, included the following: (i) establish clear plans of action as to the workout, collection, recovery, and/or exit of each asset identified as a problem; (ii) research the history of credit relationships with the Bank to determine what, if any, potential vulnerabilities may develop that could expose the Bank to future unknown losses; (iii) evaluate collateral securing the problem credits and establish a reasonable value, both at market and at liquidation, to establish the level of loss, if any, to which the Bank may be exposed; (iv) perform complete financial analysis including spread, cash flow, and *pro forma* to determine the physical condition of companies or individuals known as problem credits to the Bank; (v) prepare and deliver to the President, Senior Lending Officer and Board of Directors of the Bank periodic progress and status reports on the condition of problem assets; (vi) serve as a member of the Officer's Loan Committee and *ex-officio* member of the Director's Loan and Discount Workout Committees; (vii) keep abreast of all legal issues surrounding collection activities and work with counsel for the Bank in minimizing the Bank's exposure and losses on problem credits; (viii) coordinate the efforts of the Bank with external collection agencies; (ix) handle follow-up and recovery efforts on judgments, charge-offs, and the like; (x) assist management of the Bank in developing problem loan forecasts; (xi) assist the Bank's management of "other real estate owned" and disposing of "other real estate owned" assets of the Bank; (xii) assist the Bank's Senior Lending Officer with training programs that may be of benefit to other lending officers in the Bank; and (xiii) serve as an expert in bankruptcy cases handled internally by the Bank.

(ii) *The Job Duties*

Russell held a "project-oriented job," as opposed to a "punch-the-clock" type of job. Russell testified his job required ten to twelve hours of work at the Bank a day, if not more. Russell's job required constant interaction with Bank employees and Bank customers, and required Russell to be at the Bank every day to perform his duties. Frequently, his interactions with Bank customers involved matters of defaulted loans and failures to pay past due debts due the Bank. These encounters were with people hostile to the Bank, about matters involving great financial risk to both the Bank and the borrower. Russell testified that it could cause great damage to the Bank if he forgot a conversation or misunderstood what had been said to him.

In addition, Russell's position included the supervision of three Bank employees who reported directly to Russell. Russell was in charge of coordinating work efforts of these three employees and providing these employees with their annual performance reviews.

Russell's primary objective as Special Asset Department Manager was to reduce the Bank's problem loan portfolio. This process required Russell to use a great deal of business judgment each and every work day. Russell made literally thousands and thousands of judgment calls during the process of discharging these duties.

The level of stress necessary to perform the essential job functions of the Special Asset Department Manager were extremely high. The job required negotiations with "extremely smart people" who were borrowers of the Bank, who had either defaulted in the payments they owed to the Bank, or were trying to intentionally avoid repayment of loans. The job involved a great deal of information, coming from multiple sources, frequently in a rapid fashion.

(iii) *The Pre-Planned Elimination Of The Special Asset Department*

For the period between 1989 and 1992, Russell and the Special Asset Department of the Bank were successful in reducing the Bank's problem loan portfolio by half. By August of 1993, the problem loan portfolio of the Bank was small enough to eliminate the Special Asset Department. The plan to eliminate the Special Asset Department when the problem loan portfolio reached a certain level had been in existence at the Bank for years before Russell's automobile accident. It had been discussed with Russell, and other members of the Special Asset Department, many times before Russell's accident. In accordance with this plan, the Bank eliminated the Special Asset Department on or about August 1, 1993.

B. The Accident And Its Effects On Russell

On or about August 4, 1992, Russell was involved in a motor vehicle accident in which he was rear-ended. He had experienced similar automobile accidents in 1972 and 1982. A few weeks before the 1992 accident, Russell had undergone elective surgery on his neck, which weakened his neck muscles, and made him more susceptible to injury. In the 1992 accident, Russell suffered neck, shoulder, and back injuries, as well as a "concussion post-late effect, also known as a brain injury."

After the 1992 accident, Russell began experiencing "partial complex seizures". Although unknown to the Bank, between the accident and his last day at work at the Bank in September of 1992, Russell suffered ten or more seizures. Russell experienced a seizure in his office at the Bank in September of 1992, which was witnessed by several employees of the Bank. After that day in September of 1992, Russell never came to work at the Bank again. Until that time, the Bank had no knowledge of these seizures. The Bank merely thought Russell was suffering from "whiplash."

Thereafter, in a meeting between one of his physicians and various representatives of the Bank, Russell and his physician expressly stated that in the weeks Russell worked at the Bank after the accident, and before his September seizure at the Bank, Russell had been "masking" doing his job (*i.e.*, faking doing his job).

As the Bank would come to learn, the symptoms of a "partial complex" seizure included, without limitation, disorientation, muscle twitching in the extremities, blank staring, sensitivity to sound and light, irritability, and rage. The rage which Russell experienced would manifest itself by Russell "screaming out" at the top of his lungs and making arm gestures. Russell's wife and his doctor told the Bank in January of 1993 that Russell was not able to function; that he could concentrate for only a minute to a minute-and-a-half; that he could not drive; that he wanted to be kept away from the telephone; that he wanted to be kept away from Bank employees and Bank customers; and that Russell would go into "gridlock" if overstimulated. Further, Russell experienced difficulty in his interpersonal relationships. His wife and sons repeatedly reported to his doctors that he was "difficult," egocentric, and that he would "callously" dismiss them.

Russell's doctors refused to let him drive because he could not stay focused. He would become disoriented, and over-stimulated, resulting in "vapor-lock." In a "vapor lock" condition, Russell could lose control over his vehicle.

C. Russell's Treatment And Rehabilitation

(i) *The Treatment Plan*

In order to alleviate the effects of the 1992 accident, Russell required frequent rests of indeterminate length throughout the day, during which he had to lie down in a quiet, dark place until the feeling of agitation subsided. The rest periods Russell required would range from several minutes to more than a couple of hours, multiple times throughout the day.

In addition to frequent breaks of an undetermined length in a quiet, dark place, Russell also took multiple types of medication. Russell's medications included: (i) Tegretol (to control his seizures); (ii) Buspar (to control his irritability); (iii) Cylert (to assist him in maintaining attention); and (iv) Effexor (to alleviate depression).

These approaches (coping mechanisms and medications) were devised by Russell's physicians. However, even after Russell began this multi-disciplinary approach to his rehabilitation, he continued to experience seizures, "vapor locks," "brown outs", memory loss, impaired attention, great difficulty processing information, difficulty maintaining normal interpersonal relations, difficulty controlling his emotions, memory lapses, and could not stay focused for more than just a few minutes.

(ii) *Russell's Treating Physicians and Their Medical Records*

Throughout his treatment for the injuries sustained in the accident, Russell was attended by several medical professionals. The medical professionals involved in Russell's treatment were John Claude Krusz, Ph.D., MD. (a Neurologist), and Richard L. Fulbright, Ph.D. (a Neuropsychologist). Listed below is a sampling of the statements made in writing by these medical professionals who examined and treated Russell since the date of Russell's accident in August of 1992 (in chronological sequence in order to demonstrate the pace of Russell's neurological "progress"):

a. John Claude Krusz, Ph.D., M.D.

- October 13, 1992 — "It is not advisable that [Russell] return to work at this time".

- January 2, 1993 — "[Russell] still has a very depressed effect and has some questions as to how he is going to function in the real world".

- January 28, 1993 — "I still feel that I have some reservations about [Russell] returning to work successfully".

- November 3, 1993 — "[Russell] certainly is not fit to return to work or to be released." (This statement was made by Russell's doctor several weeks *after* Russell was terminated by the Bank in late October of 1993).

- March 7, 1994 — "[Russell's] condition, although much better than when he first came to see me, is tenuous at best. He still has a lot of irritability and fatiguability. His ability to tolerate any kind of stress is extremely limited. He still gets fatigued on a daily basis, and although he has made attempts to transition back into the workplace, I think this may not be a very realistic goal at this time."

- April 5, 1994 — "Mr. Russell continues to have headaches, memory difficulties, balance problems, sleep difficulties, irritability as abundantly outlined in my prior notes. . . . Mr. Russell has made extremely slow progress and, from my point of view, will be disabled for quite a long time, possibly years."

b. Richard L. Fulbright, Ph.D.

- April 29, 1994 — "In real terms, [Russell's] thinking has been much too slow and inconsistent for him to be able to return to any type of competitive employment approaching his former job description. . . . I continue to be concerned that Mr. Russell's impaired attention, concentration, information processing speed, memory and reasoning abilities

> may result in his making some fatal errors on the job which will ultimately cost him the job."

Dr. Krusz expressly stated on November 3, 1993 that Russell was not fit to return to work or to be released. This was approximately two weeks after Russell had been terminated by the Bank for failing to report to work in the intervening fifteen month period. Dr. Krusz reported that Russell's progress was extremely slow and that he would be disabled for quite a long time, possibly years. Dr. Krusz made these statements in early April of 1994, approximately six months after Russell had been terminated, and nearly two years after the accident.

Dr. Fulbright provided individual psychotherapy over several years to Russell, and Russell's wife. Dr. Fulbright kept progress notes of each therapy session.

The medical records are extremely revealing as to what Russell and his wife were saying to his private physicians, and *vice versa*, at the very same time Russell contended he was able to work in his former job at the Bank. For example, Russell stated in his EEOC Charge of Discrimination that he was able to go back to work at the Bank on July 10, 1993. However, Russell reported at or near that same time to Dr. Krusz that he was suffering from severe depression, tearfulness, moodiness, brown outs, and episodes of not processing information. The session notes with Dr. Fulbright at that time reflect a substantially impaired individual who, by virtue of the brain injuries sustained in the 1992 accident, was not able to function in a job environment, with multiple sensory inputs and stress, or where judgment in interpersonal relations was required.

D. Russell Was Never Released By His Doctors To Return To Work

Russell's treating physicians explicitly stated that Russell could not return to work as late as April 29, 1994, approximately twenty

months after the accident, and six months after Russell's employment was terminated by the Bank in October of 1993. Russell's treating physicians never released Russell for return for work, and repeatedly stated in writing the serious and global nature of the impairments Russell suffered in the accident. The Bank repeatedly asked Russell and Russell's doctors for such a release. It was required by the policy of the Bank before Russell could return to work. Throughout the entire course of Russell's post-accident rehabilitation, however, Russell never obtained such a release to return to work from his doctors. Any implication or suggestion by Russell to the contrary was simply not true.

E. Russell's Requested Accommodations

Russell requested the following accommodations from the Bank: (a) that the Bank provide him with Bank files to be worked on at his home; (b) that the Bank allow him to work on Bank files at his home no more than four hours per day; (c) that the Bank allow him to take as many breaks as needed, of indeterminate length; and (d) that the Bank hire an expert in cognitive rehabilitation at Bank expense to stay with him at his home and assist him in working on Bank files.

These requests for accommodations made by Russell would not have solved the medical problems arising from his brain injury. For example, Russell complained to the Bank about his secretary and a customer of the Bank calling him at home, which upset Russell to the extent that he requested that the Bank see that these calls be stopped.

Further, these accommodations would have required the Bank to re-organize its manner of doing business. It would have required the Bank to permit an unknown quantity of work from Russell on a daily basis, depending on his daily health, mental abilities, and the need for unspecified quiet time ranging from minutes to hours each day. It would also have required the Bank to hire an additional

employee of the Bank to assist Russell in the performance of a highly stressful and complex job, who would have, in all probability, virtually no knowledge about banking, or the activities and/or judgment calls Russell's job required. Finally, Russell's subordinates would be without supervision or guidance.

F. The Bank's Efforts At Accommodation

Nevertheless, the Bank attempted to accommodate Russell in several ways. First, the Bank agreed to allow Russell to have Bank files at home beginning in January of 1993, where he could take breaks as needed. The Bank files were sent to Russell's home, and several weeks later, Russell had done "nothing" with respect to those files. This accommodation was, by Russell's own admission, a complete "failure". The Bank likewise agreed it was a failure.

Second, in January of 1993, the Bank agreed to allow Russell to return to work at the Bank on a 4-hour per day basis. The Bank only required that Russell be engaged in "meaningful work" while at the Bank. The day Russell was to start this re-employment with the Bank, Russell did not show-up, and made no contact with the Bank. Although Russell did not tell the Bank the truth about why he did not report to work in January of 1993 as agreed, the Jury heard the reasons. The reasons were documented in Dr. Fulbright's session notes taken during that time. Russell and Dr. Fulbright concluded, without telling the Bank, that Russell would risk losing his job for performance reasons, and then lose his disability payments, if he attempted to return to work in January of 1993.

The only accommodation Russell requested which the Bank did not agree to try for Russell's benefit was hiring an additional employee at the Bank's expense to be with Russell at his home while he "worked" (*i.e.*, the "cognitive rehabilitation" expert). The Bank did not want to be a mere rehabilitation vehicle for Russell. The Bank saw the issue of hiring another full-time employee to assist Russell at home as an "undue hardship" on the Bank, which

would involve the Bank having to totally revise the way it conducted business.

G. Russell's Medical Records: The "Star" Of The Case

The "story and the whole story" of this case was in Russell's medical records. The medical records were introduced into evidence and were reviewed by the Jury before their verdict. They were extensive and covered a long period of time in Russell's post-accident rehabilitation. The records introduced into evidence began in September/October of 1992, right after the accident, and went through December of 1994, several years later. These medical records covered the critical time period during which the Bank began to discover the real scope of Russell's impairments. Most importantly, the medical records detailed Russell's impairments from the point of view of Russell's treating physicians.

H. Russell's Doctors And The Bank Came To The Same Conclusion

The Bank did not see any of Russell's medical records until this litigation was well underway. Without the benefit of the medical records, however, the Bank came to the same conclusion that Russell's physicians had drawn and reported repeatedly to Russell's disability insurance carrier. The Bank concluded, as had Russell's doctors, that in spite of Russell's best intentions, he was not able to perform the essential functions of his job, or any other positions at the Bank he might have been qualified to hold after the Special Assets Department was eliminated.

REASONS FOR DENYING THE WRIT

The Jury was properly instructed by the District Court in this ADA case. In fact, the District Court's Charge was in complete accordance with the ADA and other authorities. *Devitt, Blackmar, Wolff, and O'Malley*, Federal Jury Practice & Instructions,

§ 104A.04 (Supp. 1996). Russell complained about the fact that the words "reasonable accommodation" did not appear in the District Court's Charge. In truth and in fact, the words "reasonable accommodation" appeared in the Charge more than twenty times. The term was defined and it was also explained to the Jury as a duty imposed on employers. Petitioner's Appendix B, at p. 24a.

Furthermore, Russell did not preserve this argument for appeal in the manner required by Rule 51 of the *Federal Rules of Civil Procedure.*

Lastly, there is no split in the Circuit Courts on any issue of substantive or procedural law applied by the Courts below.

ARGUMENT AND AUTHORITIES

A. Standards

(i) *Rule 51 Of The Federal Rules Of Civil Procedure*

The standard of review regarding Instructions to a Jury is well-settled, as are the requirements of objecting thereto sufficient to preserve error for appeal. Rule 51 of the *Federal Rules of Civil Procedure* states, in relevant part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The failure to properly object in accordance with Rule 51 waives any error. In *Tandy Brands, Inc. v. Harper*, 760 F.2d 648 (5th Cir. 1985) the following objection was held to be inadequate under Rule 51: "We object to the failure of the Court to instruct the jury as to the theory and importance of the breach of contract on Tandy Brand's part". In this regard, the Fifth Circuit stated:

> This objection clearly does not satisfy Rule 51's requirement that a party state "distinctly the matter to which he objects and the grounds of his objection;" similarly, it was not "sufficiently specific to bring into focus the precise nature of the alleged error." See *Delancy v. Motichek Towing Service, Inc.*, 427 F.2d 897, 900 (5th Cir. 1970).
>
> Additionally, Harper did not object to the trial court's failure to submit any special interrogatories. . . . Any error resulting from the omission was, consequently, waived. . . . In the absence of such an objection, the issue cannot be raised for the first time on appeal.

Tandy Brands, Inc. at 654.

The objections must be specific enough to bring into focus the precise nature of the alleged error. *Palmer v. Hoffman*, 318 U.S. 109 (1943).

Blanket objections just do not meet the requirements of Rule 51 on specificity. *9 Wright & Miller*, Federal Practice and Procedure: Civil, Section 2554, at p. 646 (2d ed. 1995).

Further, error would not be preserved if the party claiming error offered "virtually identical instructions" to these submitted by the Court. *Dillion v. Nissan Motor Co.*, 986 F.2d 263, 269 (8th Cir. 1993); *Federal Crop Ins. Co. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985).

(ii) *The Duty Of The District Court Regarding Instructions To The Jury*

The trial court is afforded wide latitude in fashioning jury instructions. Technical imperfections are to be ignored. *FDIC v. Wheat*, 970 F.2d 124 (5th Cir. 1992); *Treadaway v. Societe*

Anonyme, 984 F.2d 161 (5th Cir. 1990); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985).

Basically, the duty of the trial court is to correctly instruct the jurors on the applicable law of the case and to guide, direct, and assist the jury toward an intelligent understanding of the legal and factual issues involved. 9 *Wright & Miller, supra*, Section 2556 (2d ed. 1995); *see also Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993).

Reversal is only appropriate when the Court's Charge, as a whole, leaves the appellate court "with substantial and ineradicable doubt whether the Jury has been properly guided in its deliberations." *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Kyzar v. Vale Do Ri Doce Navegacai, S.A.*, 464 F.2d 285, 290 (5th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *see also McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979).

Even if error in the Instructions has occurred, the Fifth Circuit has stated it still would not reverse, if it is found after an examination of the entire record, that the challenged Instruction could not have effected the outcome of the case. *Bender v. Brumley* at 276-77; *Middleton v. Harris Press and Shear, Inc.*, 796 F.2d 747, 749 (5th Cir. 1986).

Therefore, Russell must satisfy a two-part test. First, Russell must have demonstrated that the Charge as a whole created "substantial and ineradicable doubt whether the Jury has been properly guided in its deliberations." Second, even if the Charge was erroneous, reversal is still not appropriate if the challenged portion of the Charge could not have effected the outcome of the case.

(iii) *The Instant Case*

Any objections made to the Charge must have been brought to the attention of the District Court at trial. *9A Wright & Miller, supra*, Section 2553 (2d ed. 1995) ("In the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in the giving of an erroneous instruction or the failure to give a requested instruction."). For the issue to have been properly raised on appeal, Russell must have complied with Rule 51. The parties are not entitled, for example, to have the jury instructed in the precise language or form they request. *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 270 (5th Cir. 1991).

Russell did manage to specifically object to two definitions in the Charge dealing with "good faith" and "undue hardship". Russell made absolutely no mention, however, of the words "with or without reasonable accommodation" appearing in some portions of the Charge, and not in others.

General objections are insufficient to satisfy the requirements of Rule 51. *See, e.g., Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1272 (5th Cir. 1989) (finding that the objection: "To the extent any charge requested was not given by the Court" to be insufficient to "inform the Court of [the] perceived problem"); *Tandy Brands, Inc. v. Harper, supra* (finding that appellant's purported objection did not satisfy Rule 51's requirement that a party state distinctly the matter to which he objected and the grounds of his objection, and that it was not sufficiently specific to bring into focus the precise nature of the alleged error, *quoting with approval, Delancey v. Motichek Towing Services, Inc., supra*); *Williams v. Hoyt*, 556 F.2d 1336, 1340 (5th Cir. 1977) (holding that the "sweeping generalization" that the Charge to the jury was "fundamentally wrong" and "not a fair statement of the law" did not require extended discussion by the Court, because the appellant

failed to object to the Court's instruction in accordance with Rule 51). Based on these cases, it is clear that Russell's objection was not specific enough to appraise the District Court of the particular problem with the Instruction now complained about. Russell, therefore, failed to satisfy the requirements of Rule 51.

Russell argues, however, that he should be excused from the requirements of making a specific objection because he allegedly had made his position on the Instruction in question clear to the District Court. *See, e.g., 9A Wright & Miller, supra,* § 2553; and *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985). In *Pierce*, the Fifth Circuit held that the Defendant adequately preserved his objection when, in addition to making a general objection (which in and of itself was inadequate), he also filed a written memorandum setting forth his position regarding the proposed instruction. *Pierce* at 424. The specific disagreement with the Court's Charge was included in the record, which assured the Fifth Circuit as to the substance of the objection. Therefore, the *Pierce* court held, the purpose of Rule 51 had been served.

In the instant case, however, there was no evidence in the record as to what Russell's position was regarding the omission of the words "with or without reasonable accommodation" from any portion of the Charge. There was never any discussion on that issue with the District Court whatsoever, either on-the-record or in a written memorandum.

Russell claimed, however, that he had made his position known to the Trial Judge in an off-the-record conference. Russell relied on *Niehus v. Liberio*, 973 F.2d 526 (7th Cir. 1992) to argue that an objection need not be stated on-the-record. In *Niehus*, an *uncontradicted* Affidavit was submitted by the appellant's lawyer. The Court ruled that the uncontradicted Affidavit established compliance with Rule 51. Such was not the case here. An Affidavit was submitted to the Fifth Circuit by Russell in an effort to supplement the record, which effort the Fifth Circuit rejected. More

importantly, the Fifth Circuit has never approved any procedure whereby *off-the-record* objections comply with Rule 51. "If the proper objection does not appear in the record, then the appellate court need not consider the alleged error." *Burnes v. Travelers Insurance Co.*, 344 F.2d 70, 73 (5th Cir. 1965). *See, in addition, Dupre v. Fru-Con Engineering, Inc.*, 112 F.3d 329, 334 (8th Cir. 1997) (rejecting the reasoning of *Niehus* and holding that to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on-the-record); and, *Coy v. Simpson Marine Safety Equipment, Inc.*, 787 F.2d 19, 25 (1st Cir. 1985) (reviewing jury instructions only for plain error when the specific grounds of the objections were not stated on-the-record).

(iv) *Plain Error*

Because of the failure of Russell to comply with Rule 51, the Fifth Circuit limited its review to plain error. *Highlands Insurance Co. v. National Union Fire Insurance Co.*, 27 F.3d 1027, 1031-32 (5th Cir. 1994). For Russell to prevail on a standard of plain error, he must have shown (i) an error; (ii) that the error was plain, clear, or obvious; (iii) that the error effected substantial rights; and (iv) that not correcting the error would seriously effect the fairness, integrity, or public reputation of judicial proceedings. *Highlands Insurance Co.* at 1032, which case quoted with approval from *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 1778-79, 123 L. Ed. 2d 507 (1993), and held that the principles announced in *Olano* applied equally in the civil context.

In determining whether a particular jury instruction was plainly erroneous, the reviewing court is to review the Charge as a whole. *Turnage v. General Electric Co.*, 953 F.2d 206, 211-212 (5th Cir. 1992); *9A Wright and Miller, supra*, § 2558.

The Instructions specifically admonished the Jury not to single out one Instruction alone as stating the law, and that they must

consider the Instructions as a whole. "Juries are presumed to follow the instructions of the Court." *United States v. Fletcher*, 121 F.3d 187, 197 (5th Cir. 1997) *citing Zafrio v. United States*, 506 U.S. 523, 540-41, 113 S. Ct. 933, 938-39, 122 L. Ed. 2d 317 (1993). There was no indication in the record that the Jury was confused by, or failed to follow, any of the Court's Instructions.

Furthermore, the Fifth Circuit held that even if error was assumed, the stringent requirements of the plain error exception are narrow, and would apply only where the error, if any, was so fundamental as to result in a miscarriage of justice. *Highlands, supra*; *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 424 (5th Cir. 1990). There are no cases in the Fifth Circuit, or in any other circuit, that hold that any portion of the *Federal Jury Practice & Instructions* used by the District Court (and relied upon by Russell, as well) were erroneous or "clearly erroneous under current law". The Fifth Circuit held that it could not be said that the stringent requirements of the plain error exception were satisfied by the failure to include the words "with or without reasonable accommodation" in a particular paragraph of a twenty-seven page Charge, especially since the phrase was fully explained in later paragraphs and the Instructions admonished the Jury to consider the Instructions as a whole.

(v) *There Is No Split In The Circuit Courts*

Russell relied on *Glover v. The BIC Corporation*, 6 F.3d 1318 (9th Cir. 1992) as allegedly reflecting a split in the Circuit Courts on "Rule 51 objections." In *Glover*, the trial court failed to instruct the jury on causation in a negligence case. The Defendant failed to object. Since under Rule 51 the Defendant waived the error, the Defendant was trying to fall within an exception. The Defendant cited the Ninth Circuit to its "pointless formality" exception to Rule 51, which held that, *inter alia*, in circumstances where (i) the objecting party argued the disputed matter with the Court throughout the trial; and (ii) it was clear, *from the record*, that the

Court knew the grounds asserted by the objecting party, the Court would not require a "futile formal objection." *McGonigle v. Combs*, 968 F.2d 810 (9th Cir.), *cert. dismissed*, 113 S. Ct. 399, 12 L. Ed. 325 (1992). As stated by the Fifth Circuit in *Pierce*, the "purpose of Rule 51" must be served. The objection must be stated clearly, and it must be done in such a way as to be included in the record so the reviewing Court can be assured of Rule 51 compliance.

Thus, the Fifth Circuit in *Pierce* has set forth essentially the same standard for exception to Rule 51, as has the Ninth Circuit in *McGonigle* and *Glover*. The key elements of the exception, regardless of the Circuit, are the same: (i) the objecting party must assert his position to the trial court throughout the trial; and (ii) those assertions must be made on-the-record, so that the reviewing Court knows that Rule 51 was somehow complied with. *Compare, Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988) (the appellate court's inquiry is whether, considering the Charge as a whole, the trial court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading); *with Bender v. Brumley, supra*; *also compare, United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989) (giving the trial court substantial latitude in tailoring instructions); *with, FDIC v. Wheat, supra*. Russell did not comply with either of these key elements.

Thus, there is no conflict between the decision of the Fifth Circuit in the instant case, and the Ninth Circuit in *Glover*, or with any other Court of Appeals on any provision of Federal law applicable to this case, as required in Rule 10(a) of this Court's Rules. *Braxton v. United States*, 500 U.S. 344, 348, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991).

B. The Instructions and the ADA

The District Court instructed the Jury that the ADA defined a "qualified individual with a disability" as an individual with a disability who can perform the essential functions of the

employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

The District Court instructed the Jury that the term "essential functions" was defined as the fundamental job duties of the employment position the individual with a disability holds, and does not include the marginal functions of the position. Among other reasons, a job function may be considered essential if (i) the reason the position exists is to perform that particular function; (ii) the limited number of employees available to perform the job function; and/or (iii) the function is highly specialized and the incumbent employee is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n).

The District Court instructed the Jury that the ability to report to work on a consistent and regular basis was an "essential function". The District Court instructed the Jury that the inability to perform the essential functions, with or without reasonable accommodations, because the employee cannot report to work, precludes a person from being a "qualified individual with a disability" under the ADA.

The District Court defined "reasonable accommodation." The District Court instructed the Jury that employers must make "reasonable accommodation" of the known disabilities of the employee, unless the employer can show that the requested accommodations would impose an "undue hardship". 42 U.S.C. § 12112(b)(5)(A); 42 U.S.C. § 12111(10)(A) and (B). A reasonable accommodation would be one that would "enable the employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. § 1630.2(o). However, it is the responsibility of the employee with the disability to inform the employer that an accommodation is needed for the employee to perform the essential job functions. The District Court instructed the Jury that an employer is not required to provide an accommodation if unaware

of the need. *EEOC Technical Assistance Manual on the ADA*, Page III-7 (January 1992).

C. Russell's Requested Instructions Were Essentially The Same As Those Given By The Court

The Instructions given to the Jury by the Court were essentially the same as those proffered by Russell. Russell's Instruction No. 12 defined "qualified individual with a disability" as including the words "with or without reasonable accommodation". Russell cited the Court to Section 104A.04 of *Devitt, Blackmar, Wolff and O'Malley*, Federal Jury Practice & Instructions (Supp. 1996). The Instruction contained in that treatise, at that section, is worded as follows:

> The term "qualified individuals with a disability" as used in these Instructions, means an individual with a disability who can perform the essential functions of the employment position which the Plaintiff holds or for which the Plaintiff has applied.

In short, the words "with or without reasonable accommodation" do not appear in the treatise cited to the Court by Russell. Russell added those words. The District Court, however, chose to use the exact wording set forth in the treatise. This makes sense. If an employee cannot report to work on a regular and consistent basis — as was the case with Russell — reasonable accommodations (*i.e.*, any *effective modification or adjustment to the workplace* that makes it possible for a person with a disability to perform *the essential functions* of their employment position) would not matter. They would be irrelevant. This is particularly true in the case of a brain injury. If modern medicine could not get Russell out of his house and into the workplace, certainly it is not the purpose of the ADA to impose such a burden on the employer.

The District Court also instructed the Jury as to the meaning of the phrase "reasonable accommodation", again coming from

the same treatise relied upon by Russell, at Section 104A.09, wherein it was stated:

> The term "reasonable accommodation" as used in these Instructions means, modifications to the workplace which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. The term "reasonable accommodation" does not include efforts that would cause an undue hardship on the employer.

In fact, references to the phrase "reasonable accommodation" appear in the Court's Charge more than twenty times. Thus, the Court relied on and used the same authority as was cited to the Court by Russell. Error would not be preserved if the objecting party offered "virtually identical instructions" to those submitted by the Court. *Dillon v. Nissan Motor Acceptance Co., supra*; *Federal Crop Ins. Co. v. Hester, supra.*

D. Russell Failed To Properly Object Under Rule 51

Russell did not complain to the District Court that the words "with or without accommodation" were not included at any point in the Charge. Russell did not complain that those words appeared in the Charge in some places and not in others. Russell did not object to the Court's definitions of "reasonable accommodations" or "essential functions." Russell did not complain that the Court defined "essential functions" as including "the ability to work on a *regular and consistent* basis." Russell did not complain about the wording used in the treatise, or assert why the Court should change it. Russell never mentioned any of this to the District Court. The District Court had no way of knowing any of the matters Russell has now raised for the first time on appeal. Second, there was nothing in the record for the reviewing Court to examine on this issue in order to see if the purpose of Rule 51 had been served.

There was no on-the-record discussion, or written memorandum submitted by Russell. Hence, Russell neither complied with Rule 51, nor complied with any of the Rule 51 exceptions. None of the Circuit Courts, under these circumstances, would have held that Russell had preserved error.

E. The Evidence And The Verdict

(i) *Is Russell "Qualified" Under The ADA?*

Russell was not a "qualified individual" because, since the date of the accident in August of 1992, Russell was not able to perform the essential functions of his job. Specifically: (i) Russell's doctors never released Russell to return to work; (ii) Russell's position required Russell to be at the Bank to interact with employees and customers, and to make use of Bank files, none of which Russell was able to do; and finally, (iii) the Bank accommodated three of Russell's four requested accommodations, none of which made any difference whatsoever, and all of which were "failures", because of the serious impairments Russell had suffered.

Russell's claim under the ADA could not be sustained, in the unanimous opinion of the Jury, because Russell could not even get across the initial threshold. The ADA provides protection only to "qualified individuals." 42 U.S.C. § 12112(a). In communications and writings from Russell's treating physicians, it was repeatedly stated as late as April of 1994 — more than twenty months after the accident, and six months after his termination — that Russell could not work. When confronted with these opinions from his own treating physicians, Russell agreed with them. In fact, Russell admitted that the mental impairments described in writing by his treating physicians still existed as of the date of his trial in January of 1996.

(ii) *Russell's Choice: Disability Payments*

Since Russell's own doctors did not think Russell was capable of returning to work — the most essential of "essential functions" of employment — Russell continued to receive disability payments from the Bank's disability insurance carrier. Russell freely made this choice: to remain on disability, and not return to work and risk losing his job and his disability payments. Russell relied on the same medical opinions to recover disability payments from the Bank's disability insurance carrier as he presented to the Jury. Hence, Russell attempted to take two mutually exclusive positions: first, claim total disability to the disability insurance carrier, sending them doctor's report-after-report, letter-after-letter, and test-after-test showing a complete inability to work, in order to receive disability payments of $2,300 per month; and, second, claim to the Jury an ability to work, that was allegedly denied because of disability discrimination. The doctrines of judicial estoppel and simple estoppel would preclude Russell from being a "qualified individual" in these circumstances, and this has been so held by recent rulings. *See, e.g., McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3rd Cir.), *cert. denied*, 117 S. Ct. 958 (1997); *Johnson v. Hines Nurseries, Inc.*, 950 F. Supp. 175 (N.D. Tex. 1996); *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108 (S.D. Tex. 1996). These cases alone would dictate the take nothing judgment.

The truth caught Russell. The truth as it was described in Russell's medical records. The Jury saw the truth and so found. Any employee not even able to report to work is not a "qualified individual with a disability" under the ADA.

F. The Evidence On "Reasonable Accommodations"

(i) *Russell's Requests Were Not Reasonable*

Russell asked the Bank to allow him to work at home as a "reasonable accommodation." The Bank agreed to try this, and

provided files for Russell to work on at home. This experiment was a complete failure, by Russell's own admission. He had the files for several weeks and did not undertake any activity with respect to those files whatsoever. Furthermore, Russell was aware that his job functions required constant interaction with Bank customers, and Bank employees. He told the Bank to prohibit his secretary from calling him at home. And, on at least one occasion, he asked the Bank to instruct a Bank customer not to call him at home. Russell testified that he could no longer tolerate these types of personal interactions because of the brain injury he suffered in the accident.

> Although the ADA requires an employer to make "reasonable" accommodations for individuals who are qualified to perform the essential functions of their employment, the statute cannot be construed to require an employer to make fundamental or substantial modifications in its operations to insure every disabled individual the benefit of employment.

Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994). Furthermore, any accommodation which would have placed heavier work burdens on Russell's co-workers is not required under the ADA, and that is exactly what Russell's requested accommodations asked for. *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996).

(ii) *Is A Miracle A "Reasonable Accommodation"?*

Finally, and most importantly, the accommodations requested by Russell still would not address his mental limitations. Russell's treating physicians repeatedly so stated. As was noted by Dr. Fulbright in his letter of April 29, 1994 to the Bank's disability insurance carrier:

> I continue to be concerned that Mr. Russell's impaired attention, concentration, information, processing speed,

> memory and reasoning abilities may result in him making some fatal errors on the job which would ultimately cost him the job.

The case law interpreting the ADA has consistently held that the burden was on Russell to provide evidence that a reasonable accommodation would permit performance of the essential functions of the position. *White v. York International Corp.*, 45 F.3d 357, 362 (10th Cir. 1995). Russell offered no evidence whatsoever of any accommodation which would permit him to *miraculously* perform the essential functions of the job he held at the Bank. It stretches credulity too far in this matter to suggest the Bank could have undertaken any accommodation which would have miraculously "empowered" Russell to his pre-accident abilities. Such a notion is contrary to the intended purpose of the ADA, and would impose on employers a burden far beyond what the ADA intended. This is especially true when the employee has affirmatively decided, in consultation with this treating doctors, to not "risk" a return to work.

G. Russell Could Not Even Come To Work

Russell simply was not able to come to work on a regular and consistent basis. Any employee who does not come to work cannot perform any of his job functions, essential or otherwise. Therefore, a regular and consistent level of attendance has always been a necessary element of most jobs, including the one Russell held. The District Court correctly instructed the Jury to that effect. That is clearly the law. *Leatherwood v. Houston Post Co.*, 59 F.3d 533, 537 (5th Cir. 1995) ("Leatherwood has not shown that he could reasonably perform his job duties during any of his manic episodes, . . . Whether it was three (3) months or four (4) months, we agree that Leatherwood's disability-based absence from his job . . . for 33 to 44 percent of his last nine months of employment strongly indicates that . . . his disability rendered him unable to reasonably work in his position as a matter of law."); *Tyndall v.*

National Education Centers, 31 F.3d 209 (4th Cir. 1994). *See also Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (holding that because the Plaintiff could not attend work, he was not a "qualified individual with a disability" under the ADA); *Carr v. Reno*, 23 F.3d 525, 529-30 (D.C. Cir. 1994) (holding that coming to work regularly was an essential job function); *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 544 (7th Cir. 1995) ("Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed" unless employee arrives for work); *Law v. United States Postal Service*, 852 F.2d 1278, 1279-80 (Fed. Cir. 1988) (attendance is a minimum function of any job); *Falcoff v. IBM*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir.), *cert. denied*, 116 S. Ct. 522 (1995) ("Some degree of regular, predictable attendance is fundamental to most jobs"); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987) (an employee who does not come to work cannot perform any of his job functions, essential or otherwise).

Russell missed fifteen months of work after his accident in August of 1992, and before his termination. After his seizure at the Bank in early September of 1992, Russell never came to work at the Bank again.

H. The Jury's Conclusion

Thus, it was quite easy to understand how the Jury saw this case, and how the Jury so readily came to the conclusion that they did. After hearing all the evidence, viewing the witnesses (including Russell and his doctor), and examining the medical records, this Jury concluded that Russell was not a "qualified individual with a disability," which term had been defined for them as a person who "can perform the essential functions" of the position held or sought. "Essential functions" was defined for them as the "basic,

fundamental duties of the position" held or sought, which included "the ability to work on a regular and consistent basis." Russell did not object to any of these Instructions. Since Russell could not (and did not) come to work, he could not perform his job's "essential functions." Obviously, therefore, he was not a "qualified person" for protection under the ADA. This Jury was not confused and had no difficulty in unanimously concluding Russell was not qualified for ADA protection.

CONCLUSION

The Jury was properly instructed, with clear, well-written instructions which assisted them toward an intelligent understanding of the legal and factual issues involved in this ADA case. Their verdict was consistent with the overwhelming evidence admitted, which came from Russell, Russell's doctors, and from Russell's medical records. Russell's doctors said Russell could not work, and never released him to return to work. The Bank allowed Russell to come back to work in January of 1993, but he failed to report, because, as his doctor's session notes reflect, Russell was concerned he could not perform, and that he would be terminated for performance reasons, thereby losing his disability payments.

There was no "substantial and ineradicable doubt," as the law requires for a reversal. Rather, the Jury's conclusion was consistent with the conclusion previously reached by Russell, Russell's doctors, and the Bank: that Russell was not able, under any set of circumstances, to even report to work, much less perform the essential functions of such an intense job. Thus, the Bank came to the same conclusion about Russell's ability to perform as had Russell's treating physicians. The Jury reached this same conclusion, as well.

Russell sought "inconsistent results" in this case. He claimed "total disability" on multiple occasions, in word and deed. His doctors said it multiple times, as well. He even chose to stay on disability and not risk working. It would have been, therefore, an anomalous end to this case had the Jury found Russell to be a "qualified person" under the

ADA, based on the evidence properly submitted to them. Both judicial estoppel and simple estoppel would compel that Russell take nothing from this suit.

Russell did not properly object to the Court's Charge in a manner required under Rule 51, nor did Russell satisfy the elements of any Rule 51 exceptions. Again, this is not hard to understand. It was not because Russell was not given ample opportunity to do so, or did not know how. It was because this case was about whether Russell could cross the threshold of being "qualified" for ADA protection, *i.e.*, able to perform the essential functions of the job he held or sought, which included, as a matter of law, being able to work on a regular and consistent basis. For fifteen months after his accident, Russell did not come to work, although invited by the Bank to do so.

Lastly, it is clear that there is no split in the Circuit Courts, as Russell has asserted, on any provision of federal law relating to any important matter in this case. The District Court created well-reasoned Instructions relying on established law and the same treatise relied upon by Russell. The Bank believes, therefore, that the Jury, the District Court, and the Fifth Circuit Court of Appeals were all correct in their decisions, and that this case does not merit further review by this Court.

For all of the foregoing reasons, the Bank would respectfully pray that Russell's Petition for Writ of Certiorari be, in all things, denied.

Respectfully submitted,

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